IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 495 of 1999.

Date of decision: 1.5.2007

Vidya Sagar ... Appellant

Versus

State of H.P … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] yes

For the appellant: Mr. Dinesh Kumar Sharma, Advocate.

For the respondent: Mr. Ashutosh Burathoki, Additional Advocate General.

V.K. Ahuja, J.:

This appeal has been filed by the appellant against the judgment of the Court of learned Sessions Judge, Bilaspur, dated 16.11.1999, vide which the appellant was held guilty and sentenced as under:-

1. Under Section 436 I.P.C.: Rigorous imprisonment for five years and to pay a fine of Rs.2000/-. In default of payment of fine, rigorous imprisonment for six months.
2. Under Section 201 read with Section 511 I.P.C.: No separate sentence imposed.

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[1]Whether reporters of Local Papers may be allowed to see the judgment? No.

Briefly stated the facts of the case are that on 26.6.1995 at 8.45 AM, a report was lodged with the police by one Bakshi Ram that on the night intervening 24/25.6.1995, he was sleeping in his house and heard some noise. He got up and found that his cowshed was set on fire. He raised an alarm and his son Prem Lal, other family members and his neighbourers reached the spot and controlled the fire. He alleged that a dispute was going on with Vidya Sagar, present appellant also referred to as the accused who had given him threat 2/5 days earlier that he will see him and therefore, he had a suspicion that his cowshed was set on fire by the accused. On this report, a case was registered and after investigation, the challan was filed before the learned Judicial Magistrate who committed the case to the Court of learned Sessions Judge who tried the appellant under Sections 436 and 201 read with Section 511 I.P.C. On conclusion of the trial, the appellant was held guilty and convicted and sentenced as detailed above.

I have heard Mr. Dinesh Kumar Sharma, Advocate, for the appellant and Mr. Ashutosh Burathoki, learned Additional Advocate General for the respondent and have also gone through the record.

The submissions made by the learned counsel for the appellant were that there has been a delay in lodging of FIR which has not been explained by the complainant. It was also submitted that there is no direct evidence led as against the appellant, but the learned trial Court had observed that there were six circumstances and coupled together they point out to the guilt of the appellant which findings are not based upon correct appreciation of the evidence and law. He pointed out to some infirmities and

contradictions in the statements of the prosecution witnesses which shall be referred below. The submissions made by the learned counsel for the appellant were that there is no legal evidence as against the appellant and the learned trial Court had come to a wrong conclusion in holding the appellant guilty and those findings are liable to be reversed. On the other hand, the learned Additional Advocate General for the respondent/State had supported the impugned judgment for the reasons recorded by the learned trial Court.

Coming to the first plea in regard to the delay in lodging of FIR, admittedly the occurrence had taken place on the night intervening 24/25.6.1995, at about 3.00AM in the morning. Thus there was a complete one day of 25.6.1995 available to the complainant to lodge the FIR, but he lodged the FIR only on 26.6.1995 at about 8.45AM. Thus, there was delay of more than 24 hours in lodging the report. The explanation given by the complainant for the delay in lodging the FIR Ext.PW1/A was that he is suffering from paralysis and cannot move his legs and finally he alleged in the FIR that on 25.6.1995 he could not get the vehicle and, therefore, the report could not be lodged.

Coming to the statement of the complainant himself as PW-1 in support of the assertions made in the FIR Ext.PW1/A regarding delay, PW-1 Bakshi Ram stated that we remained busy in controlling the fire throughout the day and remained at the spot till 9.00AM. On the next morning he reported the matter to the police vide Ext.PW1/A. In cross-examination, he has stated that he could not report the matter due to non-availability of the bus. He came up with another plea that he was busy in controlling the fire.

Therefore, he could not report the matter. However, in examination-in-chief itself only he had clearly stated that he remained at the spot till 9.00AM and the statement of PW-2 Prem Lal son of the complainant shows that they had controlled the fire by 6.00AM. Thus, according to the complainant himself the fire was controlled at 9.00AM. According to his son PW-2 Prem Lal the fire was controlled at 6.00AM. The explanation given was in regard to non-availability of bus, but the distance in between the Police Station and the place of occurrence is 11KM as mentioned in Ext.PW1/A and he did not state that only one bus goes from his village t to the Police Station or no buses or vehicles are available or his house is on one extreme corner and buses are not available throughout the day to the Police Station. No explanation has been given by him as to why he could not report the matter on 25.6.1995 itself when the distance of 11 KM could have been easily covered by bus even in about 30 minutes or so and less time could have been taken if a vehicle was used for reaching the police station. The explanation given by the complainant is not plausible that he was extinguishing the fire since the evidence led is otherwise. Thus, there has been delay of more than 24 hours in lodging the FIR which though cannot be said to be fatal for the prosecution case, but it sounds a note of caution for the Court to appreciate the evidence with more care and caution.

Before I refer to the circumstances I may mention that in para-11 of the judgment, the learned trial Court rightly observed that each circumstance must unerringly point out only towards the guilt of the accused and the same should not be compatible with the innocence of the accused. In the light of this observation rightly made by the learned trial Court, it has to be seen as to whether all

the circumstances referred to by the learned trial Court point out towards the guilt of the accused.

The first circumstance relied upon was that there was enmity in between the accused and complainant on account of the land dispute. This fact stands established from the evidence that there is enmity in between the complainant and the accused. PW-1 Bakshi Ram has clearly stated that Amar Nath father of the accused got Nautor land sanctioned in the village which land is in his possession. The accused in his statement under Section 313 Cr.P.C. admitted that he was having a land dispute with the complainant. Thus, the complainant is in possession of the land sanctioned in favour of the father of the accused as Nautor and there was enmity in between both the parties. The enmity is a double edged weapon which can be used for causing loss to one person or it can be used to falsely implicate the said person. However, this enmity does not point out to one conclusion and that is the guilt of the accused. Therefore, though this evidence can not be used as against the accused as a circumstance to hold the accused guilty. The second circumstance relied upon by the learned trial Court was the presence of the accused near the cowshed immediately before the cowshed was put on fire. In holding so, the learned trial Court had relied upon the statement of PW-3 Smt. Sukhdei wherein she had stated that she had seen the accused with one person going towards the cowshed of Bakshi Ram ten minutes prior to the fire. Her statement was held to be plausible and convincing and worth credence especially when she stated that she had enmity with the complainant. However, to my mind this statement was not correctly appreciated by the learned trial Court. The trial Court observed that

she was the real sister of the complainant as admitted by her husband PW-5 Punnu Ram who clearly admitted that they are residing in the same village. He also admitted that he and his wife were having good relations with Bakshi Ram and the learned trial Court did not consider this fact that she was the real sister of the complainant and she stands falsified from the statement of her husband that she was not having good relations with the complainant. Coming to her deposition she stated that she had gone out at about 2.30AM and saw accused with some person in their room and she saw from the light in their room that they were talking. Thereafter, they proceeded towards the cowshed of Bakshi Ram and after ten minutes she heard the cries that the cowshed is burning. She did not state as to for what purpose she had got out at such early hours in the morning. She further observed that the accused was going towards the cowshed with another person. In case she had seen the accused on that morning it was quite natural for her to have disclosed about this fact immediately to her brother PW-1 Bakshi Ram in the next morning or PW-5 Punnu Ram that she had seen the accused and therefore, this offence was committed by the accused. However, she remained silent and though the police came to the spot on 26.6.1995, but her statement could not be recorded since PW-8 Krishan Chand,Inspector, stated that she was not available in the house on 26.6.1995. Her statement was recorded on 28.6.1995 when she disclosed about this fact for the first time to the police in her statement. It is surprising that the complainant, real sister had seen the accused near the cowshed ten minutes prior to the occurrence and helped in extinguishing the fire also, but does not report to her husband or her brother of having

seen the accused and tells this only on third day when the police came to the spot to record her statement since earlier she was stated to be not available. This statement was taken by the trial Court as a circumstance against the accused without properly discussing that her statement was not such which could be relied upon and she had deposed falsely that she was having enimical relations with her brother, though her husband had stated clearly otherwise which circumstance does not point out to the guilt of the accused which had been strongly relied upon by the learned trial Court wrongly.

The third circumstance relied upon by the trial Court was that a threat had been given by the accused to the complainant some days prior to the occurrence. It has to be seen when the threat was given, in whose presence and what was the threat given and as to whether any report was lodged with the police or any authority in this regard. PW-1 complainant had mentioned in FIR Ext.PW1/A about the threat having been given 2/5 days prior to the occurrence wherein the accused had stated that he may or not get the land but he will see him. Complainant appeared in the witness box as PW-1 and stated that the accused had threatened him in presence of Punnu Ram that he would teach him a lesson, but did not state in his statement as to when this threat was given and as to whether any report was lodged in this regard or not. Thus, there was no mention of the period when this threat was given and he should have been confronted with the report Ext.PW1/A in which the period was mentioned. But he was not confronted since no period was stated by him in his statement as PW-1.

The said threat was allegedly given in presence of Punnu Ram who has been examined as PW-5 and he stated that the accused had threatened the complainant that he will teach him a lesson and this threat was given 15/20 days prior to the incident. He was confronted with the police statement Ext. DA wherein this period has been mentioned as one month. Thus, in view of the contradictions in regard to the period or the fact that the complainant did not state about any period though alleged in his statement, it is clear that in view of the contradictions regarding period when threat was given, no reliance can be placed upon the statement of the witnesses particularly when PW-5 Punnu Ram was real brother-in-law of the complainant and as such, had every reason to support the complainant. Therefore, this circumstance can not be used as against the accused.

Coming to the next circumstances, the learned trial Court observed that the accused was absent from his office on 24.6.1995 and 25.6.1995, was Sunday which fact is evident from Ext.PW7/A and this document has been proved by Yash Pal PW-7 and Krishan Chand, S.H.O. PW-8. It was also observed that this fact stands fully established that the accused was not present in his office at Chandigarh on 24.6.1995 and 25.6.1995 was Sunday and he has not denied this fact in his statement under Section 313 Cr.P.C. The question of denial thereto arises only once fact is established from the evidence and to my mind, this fact was not established from the evidence. The learned trial Court had observed that the absence of the accused is proved from Ext.PW7/A, a copy of the attendance sheet, but no witness has been examined from the said office who could prove that this attendance sheet was being

maintained by him in accordance with law or who had made entries in attendance sheet Ext.PW7/A. There is no statement of any person from the said office at Chandigarh that the accused was absent on 24.6.1995 and his presence was not marked in this register. The learned trial Court surprisingly relied upon the statement of Constable Yash Pal PW-7 and Krishan Chand, SHO PW-8. who had gone to Chandigarh and took into possession the attendance sheet. The mere fact that this document was taken in possession by the police is not sufficient to hold that the entries in it stood proved and in the absence of any evidence of any witness from the said office, the learned trial Court wrongly relied upon Ext.PW7/A to hold that it was proved that the accused was absent from his office on 24.6.1995.

Coming to the 5th circumstance relied upon, the learned trial Court observed that since the accused had tried to destroy the attendance sheet Ext.PW7/A as proved from the statement of Yash Pal PW-7 and Krishan Chand PW-8, therefore, it shows his guilty intention. A perusal of the statement of PW-8 Krishan Chand shows that the accused had not destroyed the attendance sheet Ext.PW7/A in his presence but this fact was told to him by PW-7 Yash Pal, constable. PW-7 Yash Pal has stated that the attendance register has been taken from the office Incharge when he had taken the register to obtain a photo copy, the accused came there and torn the page of the attendance register. He then reported the matter to the S.H.O. and reconstructed Ext.PW7/A. There was no occasion for the photo copy of the said attendance register to be taken when the original had been taken in possession. S.H.O. did not state that the copy had to be given to the office and therefore,

he had sent Yash Pal for getting the photo copy. There was no occasion for accused to accompany the said constable and the solitary statement of PW-7 in this regard is not sufficient to prove the allegation of destruction of evidence as against the appellant. The entries in question had not been proved and in case the accused was aware that he had committed the offence, he could have destroyed the said sheet earlier and there is nothing from whom this document was taken in possession or as to whether it was in possession of some other person or the accused. In case the photo copy had to be taken it was quite natural for the police to have taken the concerned official alongwith them for getting the photo copy who was in possession of the register or the attendance sheet, but there was no occasion for the constable going out in the manner, it has been suggested. To my mind the statement of PW-7 is not such so as to conclude that the accused had tried to destroy the copy in the absence of any evidence in whose possession this register was or from whom it had been taken and how it proved the absence of the appellant when the document has not been proved legally. Therefore, the evidence in this regard cannot be relied upon.

The last circumstance taken as a circumstance by the learned trial Court is that the fact regarding the destruction of the cowshed. This fact stands established that the cowshed was destroyed in the fire. No conclusion can be drawn that it is a cirtcumstance as against the appellant and points out towards his guilt. The cowshed may have been destroyed by any other person or by the complainant himself to claim compensation as alleged by the accused in his defence or it may have got accidental fire. The

accused had tried to lead the evidence by tendering in evidence two copies of Rapat Rojnamcha Exts.DA and DB, to show that the complainant had lodged in report in which no reference was made and he had claimed compensation to the extent of Rs.700/- which was sanctioned in his favour. However, I am not making any reference to these documents since these were not legally proved in evidence and these are not per se admissible in evidence in the absence of proof but the fact that the cowshed was destroyed in fire cannot be used s a circumstance pointing towards the guilt of the accused. It only proves a fact that a fire took place and the cowshed was destroyed on that night and nothing beyond that.

From the above discussion of the evidence, it is clear that the learned trial Court had tried to make out six circumstances as against the appellant but they do not collectively or individually point out or lead to the conclusion that the appellant was guilty and even if taken together they are not sufficient to prove the guilt of the appellant. The suspicion cannot take the place of proof and it has to be proved on record by evidence beyond reasonable doubt that the accused had committed this crime in which the prosecution had failed. The learned trial Court wrongly came to the conclusion about the guilt of the accused having been established under both the sections and as such the findings of the learned trial Court which are not based on correct appreciation of the evidence and law, are liable to be set aside. I accordingly hold that the prosecution had failed to prove the guilt of the appellant and as such, the findings of the trial Court to the contrary and convicting and sentencing the appellant are liable to be set aside which are set aside accordingly and the appeal is accepted. Fine if deposited, shall

be refunded back forthwith. A copy of the judgment alongwith record be sent to the Court concerned.

(V.K. Ahuja),
Judge

May 1, 2007.
(BSS)